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No. 84-1420

In the

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO INVESTMENT CORPORATION,

Petitioner,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee under Trust Agreement dated January 3, 1967, and known as Trust No. 24272; ARTHUR N. BAILEY, JOANNE E. BAILEY, JAMES R. LOOMIS, PAULETTE LOOMIS and DOWNTOWN OFFICE CORPORATION,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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American National Bank
and Trust Company of
Chicago, as Trustee

CHAS. P. YOUNG COMPANY

BEST AVAILABLE COPY

PARTIES BELOW

American National Bank and Trust Company of Chicago as trustee under trust no. 24272 was the plaintiff in the District Court. The only beneficiary of American National Bank trust no. 24272 is Hatch Farm Limited Partnership; all of its partners are individuals.

American National Bank and Trust Company of Chicago is a wholly owned subsidiary of American National Corporation, which is a wholly owned subsidiary of First Chicago Corporation. Counsel for American National Bank and Trust Company of Chicago as trustee under trust no. 24272 do not know of any subsidiaries that are not wholly owned.

American National Bank and Trust Company of Chicago as trustee under trust no. 24272 is an Illinois land trust and the trustee has no discretion concerning the management of the trust. The trust document provides that the trustee must act in accordance with the instructions of the beneficiary. Counsel for respondent in fact represents the beneficiary.

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STATEMENT OF ADDITIONAL FACTS

The highly condensed statements of facts in Judge Posner's opinion and in the petition obscure the true nature of the dispute resolved by the district court. The real issue was whether CIC had the right to prevent the plaintiff-landlord and defendant-tenants from settling the case.

As alleged in CIC's cross-claim, the defendants had sought to settle the case on a basis not acceptable to CIC. CIC therefore sought to intervene in order to protect its rights as the tenant's attorney in fact and optionee. A briefing schedule was set. Shortly thereafter an agreed order was entered granting CIC leave to file "such pleadings as it deems fit and proper." (Agreed Order dated Dec. 7, 1982)

The pleadings which CIC filed included a counterclaim against the landlord and a cross-claim against the tenant. In the counterclaim CIC claimed that in equity it was mortgagee of the property involved and had an equitable right to redeem. Its cross-claim sought to enjoin the tenant from settling the case. The landlord moved to dismiss the counterclaim against it because the power of attorney and option did not give CIC any interest in the real estate. The District Court agreed. As a consequence, the plaintiff and defendant were able to settle the case and the causes of action they had asserted against each other were dismissed with prejudice on April 29, 1983.

CIC seeks a writ of certiorari so that it can attempt to undo the settlement reached by the real parties in interest.

ARGUMENT

Even if this petition for certiorari were granted and the petitioner prevailed on the jurisdictional issue presented, a reversal of the decision below would not be required. This petition for certiorari by Chicago Investment Corporation addresses only the court's jurisdiction over other parties. The petition ignores the carefully reasoned opinion of Judge

Posner which holds that the district court had independent jurisdiction over the CIC's counterclaim and therefore had jurisdiction to determine that CIC's counterclaim did not state a cause of action because CIC was not a real party in interest. Judge Posner concluded that, because CIC could have intervened as of right in the pending landlord-tenant dispute, to protect its claimed interest in the real estate as attorney-in-fact and option holder, the district court had independent jurisdiction over the claims which CIC asserted and which were decided adversely to it. (Slip Opinion, pp. 8-9; Pet. App. A33-34) *Consequently, even if the jurisdictional issue raised by the petition were decided favorably to the petitioner, such a decision would not require reversal of Judge Posner's decision.*

The issue presented by the petition is of limited interest and has no significance beyond the narrow and unusual factual context of this case. The pleadings present the unusual problem of the extent of the federal court's diversity jurisdiction to consider either a counterclaim by an intervening party or a compulsory counterclaim in reply to a previously filed counterclaim. The petition addresses only the latter issue.

Respondents' counterclaim to foreclose an alleged equitable mortgage was filed in response to a counterclaim by their tenant to determine that a sale and leaseback was an equitable mortgage. Respondents relied on the well-established principle that non-diverse parties may be joined in a compulsory counterclaim in reply without destroying the court's original diversity jurisdiction. *E.g.*, *Electroglass, Inc.* v. *Dynatex Corp.*, 473 F. Supp. 1167 (N.D. Cal. 1979); *Southeastern Industrial Tire Co.* v. *Duraprene Corp.*, 70 F.R.D. 585 (E.D.Pa. 1976); *Evans* v. *S. S. Kresge Co.*, 54 F.R.D. 536 (W.D. Pa. 1972).

The decision below is not in conflict with this Court's decision in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). In *Kroger* the non-diverse defendant who was not joined in the initial action was a joint tortfeasor with the original defendants and therefore liable to the plaintiff for

the relief requested in the original complaint. In the present case the cause of action alleged in the original complaint was for damages due from the tenant to the landlord under the terms of a lease. All the parties with any interest in the landlord-tenant dispute were of diverse citizenship and were joined originally. Contrary to petitioner's suggestion, the landlord had no reason to disregard the lease and treat the transaction as a mortgage in the original complaint. Not until after the attorney hired by CIC to represent the tenant filed a counterclaim asserting the equitable mortgage theory did the landlord file a protective mortgage foreclosure counterclaim. Unlike *Kroger*, this case was not an attempt to avoid the limitations on diversity jurisdiction.

For the foregoing reasons, respondents pray that the petition for certiorari be denied.

Respectfully submitted,

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